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ABSTRACT

Perceptions of forces that may restrain the implementation of needed change in legal ethics instruction were investigated in 1984, using a model of resistance to planned change proposed by Goodwin Watson. Based on this model, five barriers to change were assessed: conformity to norms, systemic and cultural coherence, vested interests, the sacrosanct (taboos or rituals of the community), and rejection of outsiders. Interviews were conducted with legal education authorities and qualified experts to identify proposals for change in legal ethics instruction and possible obstructing/facilitating factors. Views of traditional legal ethics teachers about course objectives/content and instructional methods were considered, based on transcripts of conversations conducted by law professor James R. Elkins in 1980 and 1981. While all interviewed authorities believed that change in legal ethics education was needed, they did not agree about the type of change. A total of 225 changes were proposed in 31 interviews. Attention is directed to the 10 most frequently identified changes and supportive/nonsupportive influences, including: increased emphasis on interdisciplinary content and development of supportive materials, increased emphasis on field placement and simulation teaching methods, increased content emphasis on moral philosophy and development of supportive materials. (SW)

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by

Elizabeth D. Gee, Ed.D.

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# RESISTANCE TO REFORM IN LEGAL ETHICS INSTRUCTION

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"What is the topic of your research?"

"I am studying law school instruction in ethics."

"But isn't legal ethics an oxymoron?"

Such was the opening of many polite conversations about the research here reported. The consistency with which the punch line was recited over the course of many months reveals some of why this particular project was even undertaken. Much about human moral striving is contradictory. Take, for example, Hurlyburly, the latest Broadway hit by David Rabe. The principal characters are the embodiment of immorality--they demean people, liberally use drugs and foul language, and lack commitment to anything or anyone. The audience laughs appropriately at many well-crafted humorous lines; yet they also delight at staged instances of abusiveness, meaninglessness, and helplessness even in the absence of artful dialogue. True, the immorality is only imagined and pretended; still, if the audience is to be entertained and

amused, they must check their moral consciences at the door. Perhaps the importance of the play is not its plot or central character, but its pantomime of the audience's moral contradiction--the human tendency to divorce profession, role, or moment from the full present of ethical possibilities and realities.

Professionals must switch their ethical sensibilities off and on. Part of what it means to be a lawyer is struggling daily with moral choices. The lawyer's personal ethics sometimes must be subordinated to the client's morality or an impersonal advocacy process. The intense moral contradictions faced by lawyers have become in recent years a matter of professional and public concern. Watergate interconnected these issues and helped to make them educationally concrete. That half the individuals indicted for Watergate related crimes were lawyers moved the American Bar Association in 1974 to mandate that law schools provide instruction in professional ethics.[1]

Yet present commentary suggests that American legal ethics instruction is failing to achieve the desired objectives. Pipkin goes so far as to conclude that ethics instruction is in such distress and such a failure that it, "like Hue, must be destroyed in its present form in order to be saved".[2] Legal ethics courses share little in common with the content, methodology, and materials of other law school courses. An awkward and uncontained newcomer to an otherwise conservative disciplinary gentry, it is not surprising that the legal ethics curriculum has been the source of much dissatisfaction. The need for change is a significant explicit and implicit theme of the literature; yet a comprehensive examination of proposals for change is lacking. Consequently,

it is likely that legal educators incompletely understand the controlling influences on legal ethics instruction and the course of its past and future evolution.

This article partially reports the findings of a comprehensive study that identifies and analyzes needed change in legal ethics instruction.[3] Presented is an examination of possible barriers to suggested curricular reform. The primary data source for this study is personal interviews with legal education authorities and qualified experts. These interviews sought to identify proposals for change in legal ethics instruction and influences that may obstruct or facilitate the suggested reforms.

## THEORETICAL FRAMEWORK

This study applies Goodwin Watson's 1969 model of resistance to planned change to the legal ethics curriculum change environment.[4] Planned change is a conscious, deliberate attempt to improve the current status of an interacting human system, whether social, cultural, or educational. Planned change, according to Winestead, "deals with developing new and better processes and relationships in responses to changing needs and expectations."[5] Unplanned change, Zaltman and Duncan report, is that which is unintended and not deliberately sought.[6] The emergence of a language dialect through a culture is an example of unplanned change; increased factory production resulting from Management's deliberate intent to improve output represents planned change.

Legal education reform has not been studied in light of planned change theories although they are highly relevant. Financial, political, and

technological forces are pressuring legal education in new ways; such tensions studied in light of planned change theory may provide valuable insight and ultimately enhance the change process. No study applies change theory to legal ethics instruction nor systematically examines efforts to improve such teaching, when, in fact, such theories may make more comprehensible the change environment. Through the application of change theory, influences that increase or decrease the probability of innovation occurring may be identified and subsequently strengthened or neutralized as necessary.

Social psychologist Kurt Lewin is recognized as one of the forebears of planned change theory. Change, according to Lewin, is the disruption or the alteration of an existing field of social and psychological forces.[7] Change occurs when the balance of forces is disrupted and certain forces gain dominance over others. For Lewin, the status quo is a position of equilibrium wherein forces check one another. Restraining impulses endeavor to change the state of those that drive toward a new equilibrium in the same sense that the latter oppose those that countervail. Considering the two polarities of motion and rest extensions of the same phenomenon, resistance is not just that which is at rest, but it is also motion:

> It is resistance so far as the body, for maintaining its present state, opposes the force impressed; it is impulse so far as the body, by not easily giving way to the impressed force of another, endeavors to change the state of that other. Resistance is usually ascribed to bodies at rest, and impulses to those in motion; but motion and rest, as commonly conceived, are only relatively distinguished; not are those bodies always truly at rest, which commonly are taken to be so.
>
> (Newton, Principia, Definition III)

Although Lewin recognizes that change is multi-dimensional, he emphasizes the importance of reducing restraining forces.[8] The theory suggests that

removing impediments to innovation will free the reform's facilitative forces to proceed with minimal conflict. Zaltman, Florio, and Sikorski define resistance as "any conduct that serves to maintain the status quo in the face of pressure to alter the status quo".[9] According to Havelock's equation--"Innovation=Demand-Resistance"--the success of a reform depends upon the relative strengths of resisting forces and demand for change.[10] Goodwin Watson's model of resistance to planned change is frequently cited as a useful diagnostic gauge for assessing the potential success of reform efforts.[11] The theory recognizes Lewin's argument that change strategies should seek to reduce or neutralize opposition in order to free natural impulses favoring the change.

Planned change and resistance to change theory has been criticized on methodological grounds. Such investigations often have been faulted as not based upon hypothesis testing or generated by systemic study of actual institutional change. According to the criticism, too much investigation relies upon subjective accounts of change processes. Watson's theory of resistance to planned change is not a direct product of empirical research nor is it necessarily an all-inclusive typology.[12]

This study uses Watson's five barriers to change to analyze forces that resist proposed reform in legal ethics instruction. He characterizes the process of resistance as moving through three stages. In the first stage, when a possible reform begins to become apparent, resisting forces are "massive and undifferentiated". Here the potential change is automatically disregarded. In the second stage, the opposing forces become more clearly defined. The power of resistance swells in the final stage and moves to

irradicate the budding change, often to the surprise of reformers who had only considered the strength of resisting forces during the initial phase.

Watson identifies five impedements to change within social systems that Levine characterizes as problems of incompatibility or unprofitability: the first three obstacles represent the maintenance of existing norms, values, and personality characteristics of the system; the last two barriers indicate problems of unprofitability.[13] The five barriers are as follows:

(1) Conformity to Norms. Norms refer to expected behaviors and attitude patterns that characterize the behavior of a particular group.[14] While norms contribute stability and definition to social structures, they also may contest altering forces. Customary attitudes and behaviors of law students that influence efforts to reform legal ethics instruction may include opinions regarding the status or legitimacy of current legal ethics courses, perceptions of the value of the subject matter and the relevance of instruction to their projected work experience, ideological orientation, motivation for attending law school, or expectations governing interpersonal relationships. Faculty norms include ideological and intellectual orientations; collective awareness levels of strengths and weaknesses of current instruction; attitudes about peers acceptable performance; agreement concerning the attributes of the legal ethics knowledge base, the purpose of instruction, and relevant pedagogy; views of outside institutions as facilitators and leaders of change; and outlooks about professional success criteria. Norms of the practicing bar may be distinguished from those of the law school faculty in, for example, social standards for professional success, emphasis on lawyer competition, the organizational concern for lawyers ethics

or the delivery of legal services, willingness for active self-policing, and attitudes about the merits of the American Bar Association Code and Proposed Models Rules of professional conduct. General cultural norms also may influence the future course of legal ethics instruction. Represented in the force field for change is the degree of social concern for cultural ethical values, politically generated influences, and level of current public concern and criticism of the legal profession and its moral conduct.

(2) Systemic and Cultural Coherence. Systemic coherence is "the Gestalt principle that parts take on characteristics because of their relationship with the whole."[15] Change in one part of the system may be affected by change in other interpendent parts.

(3) Vested Interests. A challenge to economic or prestige reward systems likely will be resisted.[16] Reward structures that may be challenged by change initiatives include economic status or power strata within legal, business, political, and social constructs. Compensation structures or humanitarian incentives may constitute barriers to reform efforts. For faculty, rewards may include authorship opportunities, membership in professional prestigious organizations, consultantships, assignments to teach prestigious courses or appointment to leading institutions.

(4) The Sacrosanct. By sacrosanct Watson refers to the taboos or rituals of the community.[17] Taboos are particularly strong that are based on ethical ideology, according to this theory. For purposes of this study, strongly held values of this type include exceptional reverence for legal analysis, particular pedagogy, types of employment, or the adversarial system itself.

(5) Rejection of Outsiders. Most planned change is externally originated, according to Watson; therefore "a major problem in introducing social change is to secure enough local initiative and participation so the enterprise will not be vulnerable as a foreign-importation."[18] Examples of outside forces that may effect law school curricular reform include introduction of non-legal ways of teaching and learning, intrusion by accreditation requirements, or pressure from law school sub-groups, traditional ways of teaching and learning, and disciplinary expertise.

The literature concerned with law school curricular and institutional reform identifies several general impeding influences. Law itself which relies on precedent is a powerful resisting force to change, and law faculty trained in the unitary legal tradition are, therefore, reputed as stifling innovation.[19] At the same time, because law schools grant full academic ranking sooner than most academic units, faculty enjoy a high degree of independence of thought which may complicate consensus building.[20] Also prevailing against innovation is the underfunding of legal education which, in turn, necessitates high faculty/student ratios. The case method of teaching locks high ratios into place because the technique is adaptable to extremely large classes. A stabilizing effect in law schools is the students' lack of interest in scholarship or innovative educational approaches not directly related to developing technical skills that enable them to pass the bar examination and practice law. Additionally, the law school accreditation process partly controls the curriculum and is perceived by some as infringing upon academic autonomy.

The literature on legal ethics instruction tends to focus on curricular inadequacies rather than reform measures and obstacles. The critique of legal ethics instruction identifies wide ranging influences that may inhibit needed change. Perhaps the most frequently cited problems are the Code of Professional Responsibility and Model Rules of Professional Conduct which, along with theoretical commentary, constitutes a substantial portion of the course content and instructional material.[21] Cady observes that the Code is not "a viable vehicle for inculcating principles in law students and inspiring them to conduct themselves in an ethical and professional manner."[22] Leleiko claims the Code is ambiguous and creates potential contradictions between professional and personal ethical systems.[23] Able argues that the Model Rules are useless in fostering ethical behavior.[24] Another difficulty is the paucity of critical scholarship and coherent ethics theory that might justify and define change strategies. Schwartz points out that legal ethics lacks integrating themes and theories of professionalism.[25] Pipkin's research suggests that students do not perceive moral education courses as important and worthwhile.[26] Bird speculates that students may find the course dull because it is limited to a study of rules and a dose of abstract case law.[27] Luban suggests that student hostility to the course may be a defense by students to being told to behave in ways that may work against the self interest of young lawyers.[28] Watson postulates that student agressive tendancies and psychological anxieties may compound teaching difficulties.[29] Students may fear that skilled advocacy may taint their sense of right and wrong; or, they may be unclear about their professional responsibility,[30] unable to see the connection of ethics to actual practice,[31] have disdain for

the legal profession,[32] or simply lack interest in pursuing the subject. Finally, morale for legal ethics faculty tends to be low because peers and students often view the course as "soft" or lacking rigor. Faculty scholarship requirements are narrow and the tenure process tends not to reward interdisciplinary work necessary to ethics-related research and teaching.[33]

## METHODOLOGY

Proposals for change were offered by authorities on legal ethics instruction in personal interviews conducted by the investigator between approximately January 1 and July 1, 1984. Barriers to suggested reform were identified from three sources: (1) personal interviews conducted by the investigator,[34] (2) the literature on legal ethics instruction and general legal education published since 1973, and (3) existing transcripts of conversations with traditional legal ethics teachers. The conversations with traditional instructors were conducted by West Virginia College of Law Professor James R. Elkins in 1980 and 1981; they are of an unstructured format and cover a broad range of issues concerning course objectives, subject matter, and instructional methodology. Several other legal educators also were interviewed although they are not considered primary sources for this study.[35] The personal interviews were used as the primary data source because they were current and specifically developed to address the research questions. Other data sources were compared to the original interview data.

Selection of individuals to be interviewed was based upon the following criteria: (1) an expert panel's recommendation of current or former law school faculty specializing in legal ethics or other legal educators and

authorities who are highly qualified to address the research objectives,[36] and (2) scholarly productivity in the field of legal ethics instruction as evidenced by the number of relevant publication since 1973. Individuals selected for interviewing represent institutional diversity: variable size, public and private, prestige and non-prestige, and secular and non-secular. Although achieved to a limited degree, wide geographical representation was not considered due to the interviewers limited financial resources. Even though institutional diversity was sought, there is no evidence in the literature that the above variables significantly influence change in legal education.[37]

A semi-structured interview protocol served as a general guide for the interview dialogue. Respondents were asked direct and indirect questions about their suggestions for improving legal ethics instruction and forces that may promote or inhibit needed reform. Branching questions encouraged the interviewees to elaborate their ideas. The semi-structured interview protocol used two sets of open-ended questions: the first question asked the interviewee to identify needed changes that would most positively improve legal ethics education; questions next were directed at identifying forces that promote or inhibit the proposed change.

An initial content analysis of the personal interviews identified the proposed reforms. Criteria for determining suggested change included (1) specific or general reference to proposals for change, (2) advocation of extensive adoption of existing practices, and (3) clear statements of problems from which an identifiable solution could be clearly deduced. A content analysis of all data sources designated forces that may positively or

negatively influence implementation of the suggested changes. The investigator interpreted forces as potentially applicable or not to the proposed reforms.

Two pilot interviews were conducted to assess interview skills and the interview protocol and the investigator's analysis of the data. Two interview transcripts were reviewed by one other individual to assure validity of the content analysis. The investigator's summaries of proposed needed change in legal ethics instruction also were sent to some interviewees for review. Of twenty-four summaries sent, nineteen, or approximately 79 percent, were returned. With the exception of two, all interview participants indicated that the summaries reflected their views, although some made slight revisions.

The restraining forces presented by this study may not be representative of all potential influences to legal ethics curriculum change. Data gathering methods allowed for only one interview with each individual, and so the interviews could not specifically explore the full range of influences because the most frequently advocated changes became known only at the end of the interviewing process. A second set of interviews focusing on the nature of forces influencing specific changes would have allowed a more complete characterization of the force field. This study is also qualified by factors implicit in any interview-based research. Difficulty in standardizing, quantifying, or replicating interview data and the variability in question delivery and response disallow significant generalization. While this study represents observations of individuals who might be considered leaders in the field of legal ethics instruction, the sample of teachers who may more typically represent the average instructor is small. This investigation did

not attempt to interview practitioners, students, alumni, or the public, although an understanding of the perceptions of these groups certainly would be valuable to the efforts of reformers.

## FINDINGS

All individuals interviewed for this study argued that change in legal ethics education is needed. However, they did not agree about the form change should take. Ten changes were proposed in the interviews at least four times or with two percent frequency. Two hundred and twenty-five changes were proposed in the 31 interviews.

The high number of total citations and relatively few changes that were multiply cited indicate there is not significant consensus among legal educators about specific innovation needed in legal ethics education. Citations by interviewees to opposing types of changes also suggest that legal educators differ in their opinions about kinds of reform that would improve instruction. For example, the recommendations to increase emphasis on simulation and field placement instructional methods were contradicted by a proposal to discourage the same instructional technique; suggestions to sequence legal ethics instruction in the first or second year were countered by an endorsement of sequencing in the third year; proposals for law schools to develop institutional ethical policies and to infuse ethics into the entire curriculum were contradicted by a recommendation that law schools should limit instruction to an explicit review of the Code or Model Rules in discrete courses. The lack of consensus concerning types of needed change may indicate

that legal educators do not think uniformally about the strength and weakness of current legal ethics instruction or viable future directions.

This study identified two types of forces that may impact change in legal ethics instruction. They are generic forces, or driving and restraining pressures common to most or all of the suggested changes, and factors uniquely impacting one or a small number of changes. Briefly described here are the 10 most frequently identified changes and likely specific supportive or non-supportive influences.

(1) Increased emphasis on interdisciplinary content and development of supportive materials (12 citations). This reform would enhance the integration of non-law disciplines with legal ethics subject matter. Recommended was increased attention to history, theology, psychology, anthropology, sociology, geography, political science, economics, and general humanities. Although this change was most frequently cited, it was not strongly advocated by those who proposed it nor considered viable and feasible.

Greater interdisciplinarity was reported as a means to generally enrich the law school curriculum. The growing complexity of law and the increased attention to the legal distribution system were portrayed as concerns that require multidimensional investigation. Reasons cited for not encouraging greater interdisciplinarity include the failure of past like endeavors, lack of financial resources, and faculty anxiety about interdisciplinary teaching.

(2) Increased emphasis on field placement and simulation teaching methods (10 citations). This proposal would strengthen clinical programming, a current component of most law school curricula. Field placement and

simulation techniques offer students the opportunity for experience in law practice. In the clinical setting, students handle a wide variety of legal problems that often present ethical dilemmas. The majority of faculty recommending an expansion of clinical offerings strongly endorsed this change and viewed it as achievable.

Supporting increased clinical instruction is the strong student backing. Students often complain that non-clinical instruction lacks vocational relevance, whereas field experience gives them the chance to try their hand at actual law practice. The legal profession also provides several levels of endorsement for clinical education programs. Leaders of the judiciary, the practicing profession and professional associations have promoted clinical teaching. The Bar's endorsement of clinical programming may be further strengthened as practitioners participate in the learning process. Another important positive force is the established clinical programs in most law schools, albeit in various forms.

A significant impeding influence to increased clinical programming is competition from other courses and time constraints. The potential lack of financial support also must be viewed as a strong deterrent: the funding of current and future clinical programming still remains somewhat tenuous, particularly given the strained finances of many law schools.

(3) Increased content emphasis on moral philosophy and development of supportive materials (9 citations). This reform would encourage the application of ethical theory to the analysis of legal ethics issues. Concepts of confidentiality, paternalism, autonomy, and the requirements of justice are examples of relevant philosophical perspectives that interviewees

identified. Individuals questioned for this study observed that faculty formally trained in philosophy are beginning to move into teaching ranks, that useful course materials are being published, and that opportunities for faculty professional development in moral philosophy are increasingly available. Of all changes cited in the interviews, this was most consistently described as increasingly the target of advocacy.

However, material and publication opportunities in philosophy were described as still limited by interviewees who commented on this change. Two discussants characterized law students as lacking the the argumentative skills and reflective ability necessary for philosophical analysis. Also suggested were incompatibilities in the inquiry process of law and moral philosophy: legal education was portrayed as favoring standard, rational, and close-ended ways of solving ethical problems; philosophical analysis was described as open-ended and abstracted inquiry. Another characterized inhibitor is the increasing trend toward a legalistic and positivist approach to ethics. Efforts to resolve ethical dilemmas by legalistic means, or by reference to set codes, standards, or rulings, were portrayed as ignoring, side-stepping, or denying the actual moral issues.

(4a) Increased content emphasis on popular and classical literature and development of related materials (7 citations). Interview discussants offered only a few examples of literary works that would be useful for teaching legal ethics. To Kill A Mockingbird, Moby Dick and A Man For All Seasons are representative of literature interviewees viewed as potentially sensitizing students to often obscured ethical dilemmas. Biography was advocated as a tool for enhancing student identity with lawyers who behave honestly in their

professional dealings. Although mentioned frequently in the interviews, compared to many other change proposals, increasing emphasis on literature was not recommended as an important reform.

Individuals interviewed for this study did not indicate influences that support this reform, although they identified a few strong barriers. The cognitive skills of students and faculty were observed as incompatible with those required for literary analysis: faculty were portrayed as emotionally insensitive; students and faculty were depicted as explicit, precise, and rational in their thinking and generally incapable of non-linear, imaginitive, and intuitive analysis. The lack of discussion about this proposal might indicate that the use of literature in legal ethics courses is an idea not taken very seriously, or that legal educators may view popular and classical literature only as incidental or supplementary material.

(4b) Development of law school institutional ethical commitment (7 citations). This proposal took a variety of forms and was less clearly defined than other change proposals. In the broadest framework, faculty, students, and all school administrators would collectively discuss ethical issues and problems relating to their professional and educational dealings and develop shared ethical standards of conduct. Encouraged was a strong communal emphasis on ethics. The narrowest recommendation argued that law schools develop policies, such as admission criteria that signal to students institutional support for particular concerns.

For this change, no specific supports were identified. Several resisting influences were offered. One interviewee argued that faculty, administrators, and fellow students are actually negative rather than positive role models for

each other. Another concern is that new informal relationships between faculty and students may be uncomfortable and intolerable for the involved participants. Also identified were problems administrators would face in developing reward and sanction policies to enforce the institutional ethic. Finally, at least three individuals interviewed for this study characterized the law school as a hierarchy based upon a reward system of grades, law review assignment, and prestigious law practice. Accordingly, efforts to achieve any kind of communal relationship with students would be seriously hampered by hierarchial structures that may protect authority lines and discourage communication between strata and mutual sharing of responsibilities.

(5) Increased recognition that the goal of instruction should be to enhance student ethical self-identity (6 citations). The interviews suggests that an important purpose of legal ethics instruction should be to enhance student's ethical self-understanding. Proposals range from helping students develop their own personal ethical norms to encouraging appreciation of the centrality of ethics in professional life. Psychoanalytic and humanistic theory was suggested as a basis for exploring self-identity issues. Instructional techniques used to enhance student self-identity primarily are those emphasising self-disclosure and inter-personal communication skills: journal writing, role playing, and clinical experiences are common mechanisms used to foster student moral self-identity. Advocates strongly insisted that law schools should develop programs to enhance student self-awareness, although several expressed doubt that law schools ever would devote serious attention to this type of change.

This proposal was the most strongly contested by non-advocates. The

humanistic emphasis on emotion and introspection was criticized as stale, passé, and precluding rational analysis. Also, despite concern for the anxiety law students experience about their education and professional roles, student psychology is not significantly researched nor discussed within the legal education community. Those legal educators who devote serious scholarly attention to ethical self-identity concerns often suffer the same diminished status as do other faculty involved in non-traditional teaching and research.

(6a) Sequence legal ethics instruction in the first year or early in the law school curriculum (5 citations). Most references to early sequencing were to first year scheduling, although a few specifically recommended offering instruction in the second year. Some recommendations were unspecific about whether or not instruction should be offered in the first or second year and merely proposed sequencing "early in the curriculum". Justifying early sequencing is the assumption that first year students are more psychologically impressionable about their role as law students and future professionals. The first year was characterized as having a socializing effect that may positively influence student ethical sensitivity and commitment. Advocates of this reform also believe that priority sequencing sends a message to students that the course is important and to be taken seriously. Competition by other courses was indicated as a strong barrier to this proposal although the development of innovative first year programming in legal writing, appellate advocacy, and models of early sequencing of ethics instruction at some law schools may encourage a first year curriculum with greater flexibility than currently is the case.

(6b) Infusion of ethics into the entire law school curriculum (5

citations). This proposal would bring ethics to the center of the formal law school curriculum. Discussion of the pervasive method of instruction - the incorporation of some ethical content into all traditional curricula - is not considered as evidence of this suggested change. Generally speaking, the proposal considered here is more recently advocated than the pervasive approach. What this suggestion requires is that ethics is made central to formal law school studies. The distinction between this proposal and that to develop a law school institutional ethical agenda is that the "infusion model" focuses on vertically strengthening the formal curriculum where the "corporate model" is more horizontal in it's concern for social and other educational contexts. Yet it should be noted that advocates of this change also tended to support a corporate concept and reform that would challenge the ethical assumptions underlying legal education. Although this proposal is strongly advocated, it was not viewed as viable.

Discussion of the change environment primarily was concerned with negative influences, including the lack of faculty competency and student need for curricula definition and structure rather than the comprehensive approach to legal ethics implied by this proposal. Another concern expressed is that the proposed change will suffer from association with unsuccessful attempts at the pervasive method of teaching.

(7a) <u>Challenge to the ethical assumptions underlying legal education by the legal ethics curriculum</u> (4 citations). The four individuals who cited this change also advocated the previous two. Proponents of this proposal argued that the legal ethics curriculum should expose alleged hidden ethical assumptions that underline law, the legal system, and the structure of legal

education. Some of the proposal's defenders claimed that an implicit ethic is expressed in the hierarchy of law school courses and reward systems which push students toward institutions serving upper and middle socio-economic classes: supposedly, the legal education hierarchy transposes into a professional hierarchy once students enter the world of law practice. The interviews primarily discussed the inadequacies of the current legal system rather than the form the change would take. However, the increasing faculty and student interest in the just and fair distribution of legal services was suggested as a strong factor favoring the suggested change. Another characterized powerful driving ingredient is the intense degree of dissatisfaction on the part of some faculty with current traditional legal education, the legal system, and the profession. Faculty disillusionment particularly was evident in interviews with faculty in their forty's and early fifties.

(7b) Increased practice experience for faculty (4 citations). This change would increase practice experience as preparation for teaching legal ethics. The most often cited reason for this requirement is that it would provide faculty with first hand experience with the ethical problems students will face in actual practice. Few observers identified potential pressures attending this change. This proposal probably would be inhibited by forces that effect other proposed changes, such as faculty resistance to non-traditional forms of legal education and to colleagues whose credentials are practice-based.

Generic Forces that Conform to Goodwin Watson's

## Barriers to Change

The following discussion focuses on generic resisting forces while, at the same time, acknowledging the particularity of pressures that may be called into play were law schools to attempt implementing any of the proposals. First characterized are distinctions of the forces across data sources, or the personal interviews, literature review and existing transcripts; next, opposing impulses are briefly reviewed for possible correlation between Watson's categories and type of suggested change; finally, restraining forces for all data sources are analyzed in light of their illustration of each of five barriers Watson identifies. Restraining influences are classified as strong if they are multiply cited or stipulated as forceful by the discussants.

For illustrative purposes, quotations are frequently incorporated in this discussion, although interview participants are not identified with particular data. Because the interviews are contemporary, quotations are mostly drawn from the original and other 1984 interviews conducted by the investigator. A line (----------) separates quotations where more than one interviewee is represented.

The original interviews, as opposed to other sources, recognize that students and faculty increasingly accept the legitimacy of legal ethics education. Yet individuals interviewed for this study are more intensely involved in scholarly activity than typical legal ethics instructors; consequently, the interview participant's perceptions may be positively

colored by strong personal interest or successful use of innovative classroom techniques.

Both the interview and literature review data suggest greater faculty alertness to the dynamics of resisting forces than did the transcripts of conversations with traditional ethics faculty; of the three sources, the interview data indicated greatest force awareness. Resisting influences described by interviewees were more complex and more likely to represent diversified pressures than were those depicted in the existing transcripts. The significance of such findings may be that individuals who only teach the course and who are not engaged in broad scholarly thinking and reading narrowly perceive the dynamics of curriculum change.

The interview data stressed resisting influences that may be termed systemic by Watson in that they interrelate with and affect other forces. Watson's sacrosanct or norm classes of barriers also were given greater weight in the original interviews than other sources. The literature tended to stress resisting elements relating to norms and rejection of outsiders. Compared to the other data sources, the transcripts more frequently emphasized Watson's categories of rejecting outsiders and satisfying vested interests.

Observations about specific types of changes also stressed certain categories of resisting forces which Watson defines.[38] For example, proposals to increase clinical programming identified norms, vested interests, and rejection of outsiders as possible reform barriers. Recommendations for new content drawing upon moral philosophy, psychology, literature, and other interdisciplinary orientations recognized that innovation may be thwarted by tendencies to reject outside authorities. Proposals to increase institutional

ethical commitment and significantly infuse ethics into the curriculum have implications for systemic restraining forces, as do reforms that would alter sequencing patterns and require faculty to gain more practice experience. Challenges to the validity of fundamental premises of legal education and the legal system appear to tread on restraining elements Watson might term sacrocanct. Proposals that may question the current mode of legal reasoning and case method of teaching also may be regarded as threatening the sacrocanct.

Conformity to Norms

Norms of legal education and of the legal profession are cited by all data sources as strong resistors. Customary attitudes and behaviors of students, faculty, and professionals were presented as significant influences to legal ethics instruction.

The data are contradictory in characterizing student norms. Commentators repeatedly portray students as increasingly supportive of legal ethics instruction; still, their attitudes mostly are depicted as powerful barriers to change. Students apparently assign low status to legal ethics courses because instruction does not conform to what they believe is legitimate legal education: low status courses lack doctrinal coherence, are taught by the lecture method, are required, are sequenced late in the curriculum or are designated by few credit hours.[39] Two individuals interviewed described student dissatisfaction with legal ethics courses:

> My own view is that the teaching of Professional Responsibility, just to be frank, in law school is scandalous. It is terrible. It is a very boring class. The students hate it. They are compulsory upper-level courses which have very little intellectual content. They have a very bad rep, which I think is understandable.

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> I think the course is generally not well liked by students. For one, it is a compulsory course after the first year. They resent that. Two, it is not generally taught by people who are interested in the subject matter. The students quickly pick that up. Three, the content still suffers from the lack of theory, lack of rigor, and lack of empirical data.

The data also characterized students as questioning subject matter that is based upon the Code or Model Rules. The moral content of the codified standards, their validity as an embodiment of the legal profession's moral vision, and the usefulness of inquiry methods applied to such standards are disputed by students. For example:

> In most ethics courses, students don't expect to spend time studying a set of rules. You would expect to study much more complex concepts and discourses. The problem may lie in the whole idea there can be a code or set of determinant rules. Certainly the Code is awful. My students are uniformly contemptuous of it.
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> The Code, . . . is a particular disaster, because our students know it. They know how stupid the codes are, how controversial, how class biased they are. Students know this. Nothing is concealed from anyone. It is tremendously self-serving of the profession to maintain its monopoly. You don't have to be a Marxist to know this. So they don't think of it as ethical at all. What does that have to do with ethics? They know that. They are very highly educated students. They have been in school for years.

Students were characterized as having little interest in ethics instruction that is not closely related to their current situations or projected work experience. Strong student norms favoring practice-related educational experiences are reinforced by the law school social culture: peer pressure to identify jobs appears early in law school; students are quick to perceive that professional success is defined in terms of large firm practice, power, and income earning ability rather than in serving humanitarian purposes. According to one observer,

> They choose the law not as a human service but an an entry into organizations in the wealthiest sectors of society.

Student and faculty norms were portrayed as significantly incompatible in important respects: faculty value teaching and research in preference to practice; students clearly revere practice and are interested in instruction that is strongly tied to employment. For example,

> Students are motivated to get through. They are not there because they want to become professors . . . The professors want the students to be like them, and the students don't want to be like them.

The data frequently characterized faculty as driven to teaching careers by their aversion to law practice, as one commentator remarked:

> Most law professors are refugees from law practice. They are people who have either never wanted to go into law practice, or went into practice and for one reason or other didn't like it. It is an oddity that they would be the ones who would teach people how to practice law, or to draw upon their own experiences as reflective of the practice.

Faculty, administrator, and student norms governing interpersonal relationships also were repeatedly described as incongruous and inhibiting change. For example, sexual improprieties may interfere with efforts to establish institution-wide ethics programs involving close associations among law school faculty, administrators, and students. For the same reason, sexual improprieties may discourage change strategies that would promote student ethical self-identity.

Faculty attitudes about acceptable peer performance may play a significant role in curtailing reform. Status attainment in legal education is defined by narrow criteria. Many proposed changes imply acquisition of competencies that are at variance with traditional faculty tenure and promotion requirements or general professional norms. Some ethics instructors

do not enjoy the credibility of faculty who teach traditional courses, as one commentator remarked:

> People who like to teach and enjoy the subject matter [ethics] are known as "softies." They get marginalized by this.

An added barrier may be the weak stature of clinical faculty, many of whom include ethics content in their programs. Although some discussion characterized clinical teachers as legitimate law school faculty, other suggested that clinical instruction is a low status program. Clinical faculty are repeatedly observed to be lacking in theoretical and analytical orientation, writing ability, and general scholarly competence--attributes stressed by tenure and promotion criteria. Some are regarded as non-conformists and representing leftist political ideologies.

A serious impediment to curricular reform is faculty disagreement over attributes of the legal ethics knowledge base, the purpose of instruction, relevant pedagogy, and faculty or student characteristics. Faculty attitudes about the subject matter represent divergent assumptions about the dynamics of professional or ethical responsibility, the past and current level of the legal profession's moral conduct, the legitimacy and moral content of its codified standards, the process or method of law-related moral inquiry, and the ethical dimensions of the legal system. Also disputed is whether or not instruction should increase critical awareness and ability of students to articulate the profession's formal codes and standards; sensitize students to the numerous dimensions of ethical dilemmas; encourage student ethical self-understanding and enhance their ability to consciously develop their norms; make students more moral; or develop in students ethics-related character traits, such as manners, a sense of justice or courage. An important point of

controversy over pedagogical assumptions is the effect ethics instruction has on moral disposition, as the following contradicting statements illustrate:

> You can't train them to be ethical. It is impossible, either by precept or example.
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> There is a whole attitude that they necessarily develop when they are with us about what they do, how they behave a lawyers. That is all obtained in law school. It is not only possible [to influence behavior], it is impossible not to. What we do is send them out with shoddy values they learn in law school, or we don't send them out with any. It's just silly to think that.

Faculty also strongly disagreed about the means by which ethics implicitly or explicitly penetrates the law school curriculum, the relevance of ethics instruction to legal practice, the impact of law school socialization on students' ethical behavior, and the influence of the work environment on moral conduct. The appropriate curriculum content and instructional methodology for legal ethics courses also is disputed.

This study found a lack of consensus among faculty over whether or not a strong implicit ethic underlies law school instruction. Several interview participants argued that a hidden ethic is found in the hierarchy of courses, particularly the higher status assigned courses supposedly representing right-wing, conservative, and middle-class ideology. Others suggested that classroom presentation of basic doctrinal analysis and legal procedure carry moral significance which students are not critically prepared to decipher. One interviewee remarked:

> The case method is very "a-ethical" and amoral. It is an attempt to scientifically analyze what the various factors are without evaluation. Of course it is not value-free. You don't have to be a brilliant legal scholar to understand that the American legal system never has been value free.

Observers indicated that collective faculty norms at individual law schools may vary. For example, faculty at non-elite schools look to elite schools as important change facilitators and initiators:

> I think what we are waiting on right now is some sort of development in the core in elite institutions. We are waiting on Stanford, Harvard, and NYU [God knows whatever happened to Yale, where they have been the last years] to do something with the curriculum, to really explode and to break up, to pull the plug on the existing first year curriculum, so we can get some innovative new approaches. I think we are waiting on those elite institutions to do something.

The data suggest a diversity of factors that may favorably influence the profession's attitude toward change. A strong assurance of continuing interest in legal ethics instruction is Watergate, the ABA accreditation mandate, increased lawyer competition, stepped up malpractice litigation, and growing concern for the equitable delivery of legal services. Yet also apparent are professional norms that may resist teaching reforms, such as the legal profession's alleged conservativism. One legal educator portrayed the Bar's moderatism by recalling its recent reluctance to revise the Code:

> Now when the ABA Code was revised, the profession as a whole showed itself to be very conservative in the sense of resisting change. The Commission wanted to go further in reform in terms of toning down the shield to confidentiality, but didn't get far.

The norms of law practice repeatedly were depicted as modeling values emphasized within law schools. The practicing professional defines success by monetary gain; law school success, in turn, is determined by the extent to which the institution produces prospective lawyers that satisfy the standards of professional status. Students recognize the configuration of professional success and hence define their personal striving in light of such criteria, as the following comment illustrates:

> I think we are under enormous pressure from the Bar all the time, because our income is heavily dependent on the fact that we can turn out students whom these firms need and who make quite remarkable salaries. That is, in large part, why we are the strongest part of the universities, why law schools are even stronger now than medical schools. So you are continually under the pressure to produce products precisely attuned to their needs, which is very understandable. But of course, it absolutely is contrary to what a university is supposed to be doing in training an independent-minded people who are supposed to both be capable of working in their society, but also having critical input.

Professional norms stressing practical skills also are at odds with law schools which emphasizes theory in favor of technical competency.

Also frequently characterized were professional norms that discourage active ethical self-policing. For example,

> Professional etiquette is more powerful than professional responsibility.
> ---
> I talk to former students who are in various kinds of law firms where a wide range of ethical misconduct is prevalent. The incentive not to blow the whistle is just extraordinary. There are all problems of confidentiality and hierarchy and so forth, so I don't think that the legal profession has even begun to do anything which is going to have a serious impact on improving the ethical behavior of lawyers.

Several commentators argued strongly that law school and law practice norms are antithetical to ethical sensitivity. The high value assigned moral relativism, instrumentalism, positivism, rationalism, competitiveness, and advocacy were depicted as contradictory to empathic and conciliatory truth-seeking competencies:

> The arts of advocacy work against ethical impulses. Feelings of compassion and sympathy are suppressed in the interest of one's client so to get as much as possible from the other fellow.
> ---
> I think there is probably a subtle difference, particularly in the law, between seeing an ethical issue as a genuine moral problem and something that you should try to wiggle your way around--a road block, something in the way. Where the moral issue is seen as just a problem it really doesn't get moral weight. It is a

> professional complication to be dealt with in some way that for the practitioner may not raise any very fundamental questions . . . This is the sense that I sometimes get: people supposedly do not think philosophically or ethically, particularly; ethics is just problems, a bother, a difficulty; it is not something that provokes one to think deep thoughts. It provokes you to be more clever in order to get around it. And, I suspect that is because the profession has certain standards, and they are there, and you accept them. You have to learn to live with them, and you have to be clever not to violate the rules. It is one more set of rules. Moral rules come to be treated like the law in general. Mainly it is something to be sort of respected. But, more often than not, it is a question of "How do you work yourself around the law? How do you find the loophole, the way of dealing with the law that will get by the courts?"

Legal ethics problems, according to one interviewee, have become increasingly complex for the practitioner because of the size of law firms and range of the lawyer's involvement in the client's legal affairs; the secrets the practitioner learns as a tax lawyer, for instance, raise very complicated issues of detail, and therefore:

> Perhaps the larger issues of lawyer responsibility . . . , of confidentiality versus duty to the court or to the public, get neglected in terms of the convential rules about confidentiality and where does this detail fit in. The subject has become so complex that some of the great simplicities have been lost . . . And so it becomes rigorous in the sense that it is very minute inquiry.

Legal educators interviewed for this study frequently reported that rationalistic and instrumental strategies for resolving ethical dilemmas, as opposed to conciliatory methods, represent polar male and female norms. Indeed, a potentially significant new variable in the evolution of norms is the infusion of women into the professional and law school environment. Women were generally characterized as more concerned than men about ethical dilemmas and as giving greater weight to the dynamics of interpersonal relationships, solidaristic activity, and conciliatory strategies. For example:

> You could see [women law students] really struggling with their feelings . . . : "I feel badly about this; I don't know how to resolve this; I am worried about dumping on client X because I have to withdraw from his case, according to the Code." Whereas, the men [say]: "Well, it says in the Code that . . . " It really is a perfect manifestation of the . . . dichotomy.
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> I think women are much, much more sympathetic to all of the empathic issues of being a good lawyer. A good lawyer has to be empathic.

Often observed as not encouraging innovation and experimentation are the prevalent values of the university culture; they are viewed as passively conservative and emphasizing teaching, research, and the preservation and communication of present knowledge.

The data also indicated factors that may potentially mitigate the resisting power of established norms. For example, one observer noted that although legal ethics instruction still is viewed by faculty as less presitious than other courses, it is gaining in status:

> It is still not considered a popular course. It used to be considered a real dog. The best people were not used. It was not thought of as very challenging. Now it is a tough and challenging intellectual subject. There is a full panoply of ethical rulings and judicial decisions, a substantive body of case law in addition to the Code and Model Rules. Yet in general it is viewed as not as vital. The increasing number of lawyers, the proliferation of specialization, and the widening geographical heterogeneity of the profession may weaken long held values that support the current orientation to legal ethics instruction.

Disparity in norms of different quarters of educational and professional culture--students, faculty, administrators, and practitioners--also possibly check restraining powers. Each group may develop loyalties to their own values that compete with other groups; for example, faculty may define professional status as scholarly achievement, whereas students may see professional success in terms of large salaries.

Systemic and Culture Coherence

The interview and other data sources portrayed the systemic or interdependent nature of restraining influences as having significant bearing on reform efforts. Forces characterized as systemic represent connections between groups both internal and external to the law school. Mutually integrated influences to change include norms of the law school population; therefore, reformers promoting many proposals may need to align several tiers of values. For example, one interview participant argued that "students and faculty are tied to the traditional perspective" of ethics instruction. By "traditional perspective" he referred to the typical presentation and analysis of the Code and other formalistic standards:

> Both students and faculty are tied into the traditional perspective . . . Tradition is reinforced from all different kinds of directions. It is reinforced by the university at large; it is reinforced in society; it is reinforced because people think they have to go out and get jobs and then need certain kinds of things.

In this case, change in the subject matter and teaching methods would require changing both faculty attitudes and student expectations.

Many of the proposed changes may require reformulating both law school and professional norms, including professional success criteria, law school reward structures, and notions about the usefulness of outside authorities to the teaching of law. For example, the proposal to challenge the ethical assumptions of legal education requires critical examination of many suppositions underlying the curriculum content, instructional methodology, and legal analytical or procedural strategies. The ethical bases of an alleged hierarchical reward system for students and faculty would mandate consideration. Attitude structures external to the law school environment,

including beliefs of law practitioners and value premises of the legal system, would require analysis. The possible presence of a hierarchy within legal education, the legal profession, and legal system makes pluralistic change particularly problematic. According to Hage and Aiken, the more pronounced the stratification, the lower the rate of organizational change.[40] Extreme differentiation encourages subgroup solidification; multiple bases of power or political units may compete with each other for rewards in the face of change that may appear to favor other components or threaten group prestige. For example, one interview participant suggests that faculty have a strong need for security which is satisfied, in part, by their power over students:

> I see the faculty as having a need for control, hierarchy and distance. It is a limiting factor on their ability to relate to students . . . If you keep on the ground level where you are better, then obviously you win the battle.

Another discussant characterizes law faculty and practitioners as competing with one another for the opportunity to train law students in ethics.

> I predicted that this would happen, that once it got clear that we were going to do this, then narcissism would require that we superb teachers, especially those a Harvard, have to do the teaching ourselves. We couldn't possibly turn that over to the likes of the folks out in practice.

An example of inter-subgroup competition can be found at Harvard Law School where Critical Legal Studies advocates, several commentators allege, inhibit the school's strong initiatives in ethics instruction:

> The Critical Legal Studies group has created a lot of tension on the faculty--severe discontentment and unhappiness--so there probably will not be much innovation [in ethics instruction] right now. They have been intellectual leaders, and ordinarily for the good . . . They have not been just resting on their laurels. They really have been in the forefront. They have always had good money and good people.

Student subgroups, such as women, minorities, law review, moot court, or political activists, also represent different hierarchical stances in law school that may pursue conflicting objectives.

Cultural trends are systemically significant to the change process. Because societal institutions--family, church, and schools--historically have been concerned with developing moral values, their evolution influences the law school's role in ethics education. One observer argued that legal education is not adequately adapting to the declining role of cultural establishments in the formation of ethical values for young adults. He questioned the law school obligation to compensate for societal changes:

> I think one of the things we have to reassess is, when the current model evolved in the elite law schools on the East Coast in the 1870's and the 1880's, what was the nature of the student population we were working with, socially and psychologically. You were dealing with young men in their early 20's who had mostly gone to prep schools or good public schools like Boston Latin and Harvard College. They came from money families. They were the "squire-ocracy" of the country--Victorian orientation. They had character formation since they were two years old. They all had Latin and Greek. They had Rhetoric. They had a sense for history. They all went to church on Sundays, although they probably were a little wild in college. The law schools didn't have to worry about character formation or history of jurisprudence or any of these things because it had all be given to these people in their prep schools and in their colleges. What happened by the 1960's and 1970's is that you have a student population who hasn't had any of this. And yet the law schools, in what we do, have failed to recognize the changing environment which is sending us students. It is like you design a machine to make glass milk bottles, and suddenly what you have are very fragile cardboard cartons. If you put those cardboard cartons through the machine, they are all going to get crunched up, because the machine is designed to use glass bottles. Something like that has happened over the last 30 or 40 years, it seems to me. Which then raises profound curricular issues: Do we in law schools have to make up for all of that, or do we raise a red flag and say, "Hey, look, you are sending us this kind of students. Don't blame us. Our job is to train them in these ways, and this is what we are designed to do, and we do a very good job at doing this. We will do this part of the package. But there is this,

> this, and this part of the package that someone else is supposed to be doing." And it used to be the families, the churches, the high schools, and the colleges. And they are not doing it any more. And so when Derek Bok gets up and criticizes law schools and lawyers for this lack of commanding contribution to our society, that is not the fault of law schools, that is the fault of the whole society.

The interlocking network of conservative prestige education institutions is cited as a strong obstacle to law school reform. This elite network controls other change variables: undergraduate instruction, testing standards, pre-law advising, hiring and clerkship patterns, and accreditation standards. The problematic financial status of many law schools may even enhance the potential influence of alumni and donors in curricular policy or other law school affairs. For example,

> Well, you take all the elite law schools. They are an integral part of a really tight network of institutions. They support each other and limit each other's potential for change. They are also part of a larger network that is resistant to change. The larger network includes law firms, judges who have clerkships to allocate, pre-law advisors, and the Educational Testing Service . . . As alumni fundraising has become more critical, law schools don't want to do anything to offend alumni or do anything that is going to make their students less likely to be affluent givers in the future.

Finally, the increasing body of rule and law regulating professional conduct have considerable impact on legal ethics courses. According to one discussant, instructors will feel obligated to cover legal regulations so students are defensively equipped against possible disbarment or discipline:

> We are not talking about goody, goody. I am trying to help them stay out of jail, and help them prevent being sued, and help them prevent getting in a bind between clients . . . If you don't want to be a crook and you don't want to be a hero, then you better learn how to handle yourself.

Vested Interests

Law school observers questioned for this study reported that students, faculty, and practicing lawyers are strongly aware of the degree to which some of the proposed changes potentially increase or decrease their prestige or economic interests. As indicated, some observers believe students enroll in law school to acquire skills that open doors to high economic strata, power, and status within legal, business, political, and social spheres. Students were less frequently portrayed as motivated by potential humanitarian rewards. The compensation structure of the legal profession was depicted as closely paralleling student concerns. Faculty, on the other hand, were portrayed as less preoccupied with financial remuneration than students or members of the practicing profession. Instead, their incentives are tied to prestige issues, such as association with elite intellectual communities. Concrete rewards include a chance for promotion, tenure, and advancement within the law school hierarchy. One interviewee provided a colorful characterization of the reward structure:

> We are like princes in law school. Once you get tenure in law school, you really are like a Renaissance prince.

Other incentives include authorship opportunities, service in prestigious organizations or committees, consultantships, and appointments to elite institutions. Instruction and publication in certain specialized areas are viewed as prestigious. Constitutional Law, for example, is considered a speciality area of greater stature than Family Law or Poverty Law. Senior faculty who have flexibility in choosing the courses they will teach are viewed as having high status. Positive feedback from students also constitutes a significant reward to faculty.

The systemic nature of change likely will require that rewards at several levels of the legal education and legal profession enterprise be altered. In fact, change in one reward system may clash with established incentive structures of another. Legal education institutions are motivated by distinct rewards that may conflict with incentives which function for professional groups.

Incentive systems in areas of the university other than the law school may be barriers to several identified changes. Academic units may compete with each other for rewards and financial support. For example, proposals that would enhance the moral philosophy content of legal ethics instruction--possibly through team teaching--may confront negative incentive structures in both philosophy departments and law schools where interdisciplinary teaching and research is not supported.

Finally, all members of the legal profession derive status from the restrictive and monopolistic nature of the profession. Distinctive jargon, procedures, formalized ethical standards, self-regulation policies, and training requirements enhance the prestige of the professional membership. Members of these professional monopolies are likely to resist forces that threaten group exclusivity.

The Sacrosanct

Idealized traditions or apparent rituals of the legal education culture are not frequently discussed in the data. However, where "sacrosanct" forces are identified, they are recognized as embodying significant resisting power to change in legal ethics education.

A dimension of legal education observers frequently mentioned as bordering on the "sacred" is what one interviewee calls the "mystique of legal reasoning." Students particularly are characterized as caught up in the mythical impression that traditional legal analysis, notably the consideration of court decisions through defined deductive reasoning and criticism techniques, are the sum total of legal education:

> The legal method, well it has this power . . . because you can construct an argument with premises and conclusions, and very focused . . . Here you have a method which seems extremely explicit and discursive, and they [students] say, "My God, I can now think."

One discussant observes that student reverence for legal reasoning hinders tolerance for other problem solving approaches:

> The mystique of legal reasoning . . . hurts professional responsibility education in the sense that people have been taught to think that the first semester, first year curriculum is what legal education is all about. They don't take seriously any other forms of legal education.

Also discouraging increased attention to the ethics of lawyer conduct is the law student's romantic image of the adversarial system, as one interview participant remarked:

> They call upon . . . images of themselves which are heroic images. Of course, they will never do anything unethical, and if they do something that is unquestionable unethical, they justify it in terms of the needs of the adversary system; and there is a lot of professional support for this view.

The data suggested the veneration of the Socratic method of classroom discussion; indeed, the tenacity of this pedagogical technique may indicate that instructional routine carries more weight in legal education than other elements of the curriculum, including the subject matter. For example, the success of the clinical movement may be due to its recognizable and easily

adapted teaching method, despite its highly diversified and somewhat amorphous curriculum content.

All data sources indicated high faculty and student anxiety, or at least significant ambivalence, about the law school's advance into the realm of ethics. The strong opinion discrepancy regarding the nature of legal ethics and relevant pedagogy may suggest that the change process has brought highly resistant ritualized influences into play. Yet an interesting dichotomy is what appears to be faculty willingness to explore the tacit ethic of legal education. While some instructors argued that law schools do not affect moral conduct, many who advocate challenging the hidden ethic in the law school curriculum claim that implicit values underlying subject matter, teaching methods, and administrative structures alter student morals, especially political attitudes toward the economy and the legal system. For example,

> I think law schools have a profound effect on peoples' values, but it is the unspoken agenda that affects them. And you can't change people's values by telling them you are doing it.

Many of these same educators are unwilling to undertake explicit ethics instruction. They argue that formal coursework has no bearing on students' or lawyers' moral conduct, as one interview participant remarked:

> But, let's not fool ourselves by saying we are going to produce a more ethical generation of lawyers because of this course in professional ethics.

Thus, the hidden ethics of law and the law school curriculum appears to be less sacred than traditional legal ethics and professional responsibility courses.

Rejection of Outsiders

Watson contends that external forces precipitate most changes. Indeed, for all data sources, the most frequently cited influences accounting for the current curricula emphasis on the legal ethics curriculum are Watergate and the American Bar Association accreditation mandate. Yet Watson also points out that an important psychological trait is suspicion and resistance of change originating with outside agents. Opposition to outside forces is a significant and constant theme throughout all discussion of change.

"Outside" factors were considered not only as impulses external to the law school environment but also external to individual law school subgroups. That is, in certain contexts, law students view faculty as outsiders; faculty view law school administrators as outsiders; and traditional faculty regard change-oriented faculty as marginal members of the law school community.

The concern of the teaching profession for possible encroachment by practitioners is an example of one element of the legal education culture threatening another. Commentary about proposals to increase clinical teaching and to require increased practice experience for faculty regularly portrays negative attitudes toward practitioners. Some faculty who advocate challenging the ethical assumptions underlying the curriculum are viewed as politically leftist or excessively liberal and, hence, "outsiders." Faculty seeking reforms that increase student self-identity and who may be especially concerned with student emotional competencies may be seen as "soft." Suggestions for greater institutional ethical commitment and improved student self-understanding also represent incompatible interests of law school subgroups. Both proposals require a breakdown of faculty and student status

structures; faculty authority and control of students would be diminished; student independence from faculty outside the classroom also may be lessened.

Resistance to non-legal subject matter is viewed as a major obstacle to implementing several suggested changes, including proposals that would increase content emphasis on interdisciplinary perspectives, moral philosophy, literature, or that would enhance student self-identity. Each such instance requires the incorporation of another knowledge base into an existing curriculum. Some proposed subject matter would require students and faculty to develop different cognitive orientations and disciplinary competencies. One instructor recalled his attempt to incorporate interdisciplinary content into a legal ethics course:

> My experience with law students is that they are much more apt to deal easily with these concepts and talk about them if I don't talk about them as if they were interdisciplinary . . . We teach students implicitly that lawyers are at the top of this pyramid, and we really are omniscient, and we don't really need these other folks who are somewhat down here on the pyramid. We make fun of people who do empirical work and stuff like that. That is, we have taught them interdisciplinary work is useless.

Many faculty, students, and practitioners view outside perspectives as irrelevant to legal ethics education. For example, ethical theory is seen as not essential to understanding fundamental ethical problems because law itself embodies doctrine that recognizes moral concepts, such as justice, fairness, rights, and obligation, as one commentator recalled:

> I had a general feeling, having worked with most of the people who have worked in legal responsibility, that they feel the law has a sufficient body of theory that it doesn'tneed other fields . . . There was a kind of scorn for moral philosophy; they kind of felt that they didn't need this stuff. I think that is because law does have a theoretical ingredient . . . In law you have jurisprudence and you have talks about rights and duties and obligations and you can sort of make due without going anywhere

> else. So, when they get rhetorical, it sounds like legal language. You've got the language of law, and not the language of philosophy.

The content of legal ethics courses which has been characterized as increasingly emphasizing codified standards, law, and rule was seen by eight individuals interviewed as discouraging the incorporation of moral philosophy. Also, the newly revised Model Rules do not specifically address ethical principles as is the case with the Code; thus, there may be less incentive for using non-law inquiry processes when considering revisions of the Model Rules

Concern about relying on outside authorities to solve legal education's problems was frequently expressed. Observers suggested that non-legal expertise is a superficial "band-aid" for problems that in reality are deeply rooted and need comprehensive solutions. The use of other disciplines may give the false impression that educational deficiencies can be remedied by the mere importation of outside authorities.

Watson's discussion considers the history of experimental demonstrations and emphasizes that they are seldom adopted. The bioethics model of professional ethics instruction typically was regarded by legal educators as inappropriate, even though it may be highly compatible with law school needs. Indeed, all data sources indicated very little interest, awareness, and knowledge of other potentially relevant instructional models.

Finally, ethics instruction, although a regular ingredient in the law school curriculum, still is regarded with some xenophobic reaction by faculty and students. While some attitude change is evident, it continues to be viewed as an "outsider." Had legal ethics instruction been the product of

internal initiatives instead of outside impetus, perhaps, the response would have been more amicable.

## CONCLUSION

Fundamental to understanding change in legal ethics instruction is the question, "What renders change unsuccessful?" This article attempts to illustrate the important variable of resisting forces in equations for change. The tendency for restraining impulses to endeavor to change the state of those that drive toward a new equilibrium reflects Newton's thesis of action and opposed equal reaction: "If you press a stone with your finger, the finger is also pressed by the stone." This study investigates perceptions of change impediments that conform to Goodwin Watson's proposed barriers to change. For law schools attempting to improve legal ethics curricula, Watson's theory suggests that restraining pressures to reform should be recognized and strategies developed that neutralize their negative power.

The indicated magnitude of some resisting forces is sufficiently significant as to suggest that reform in legal ethics instruction is unlikely or will be difficult. The interrelatedness or systemic quality of many restraining factors enhances their strength. Several proposals would require corresponding alterations in, for example, undergraduate instruction, testing standards, counsel by pre-law advisors, alumni giving patterns, and professional criteria for success.

Some identified barriers to change are recognized in existing commentaries on legal ethics instruction, such as student dissatisfaction with legal ethics courses and lack of interest in instruction that is not practice

oriented; other impediments find new expression in this study. These findings stress student criteria for success as based upon monetary and prestige attainment, rather than on humanitarian purposes. Also portrayed are strong contradicting faculty assumptions about the premises of the curriculum knowledge base, instructional objectives, pedagogical techniques, the validity or moral content of the codified standards, faculty and student characteristics, the ritualistic significance of features of the curriculum, and the relationship of ethics to the legal delivery system. Indicated is significant faculty disagreement about the implicit ethical content of law school instruction, the legal profession, and the legal system. This research found that non-law approaches to ethics may be resisted on grounds that other disciplines appear superfluous to existing legal doctrines of justice, fairness, rights, and obligations. The trend toward a positivist or legalistic orientation to legal ethics may constitute strong resistance to the use of outside expertise in addressing the ethical dimension of law and legal problems. Faculty, student, administrators, and law practitioners were repeatedly characterized as assigning different worth to practical or theoretical oriented curricula. Members of the bar were depicted as placing importance on monetary gain and resisting self-policing. Frequently mentioned impediments were law school and law practice norms, such as moral relativism, rationalism, and adversariness, that may be antithetical to ethical sensitivity. Differentiated law school subgroups were portrayed as power bases that diminish the likelihood of change and as resisting reform which threatens to reallign heirarchial boundaries, such as faculty authority over students. Norms governing intergroup or interpersonal relationships and

sexual proprieties were found to potentially inhibit reform. The identification of dissimilar male and female participation and interest levels in ethics courses constitutes a new variable in efforts to improve instruction.

The resisting forces identified and analyzed by this study may be considered generic, or common to most or all suggested changes. Many generic forces also may be regarded as relevant to proposals for general change in legal education. Influencess common to both change in legal ethics education and legal education include the unitary and conservative quality of legal education, the tacit network of prestige institutions, faculty autonomy, lack of financial support, concern for outside influence or boundary infringement, and lack of prestige and financial incentives for reform initiators.

This study's attention to restraining forces does not imply that change is uni-dimensional or that strong driving forces supporting innovation in legal ethics instruction are non-existent. The interviews reported an increase in faculty and student recognition of the legitimacy of legal ethics instruction; particularly, the increased concern for the ethical dimension of the legal distribution system was described as a positive influence to the law school efforts to improve the existing curriculum. Strong forces external to the law school were characterized as sustaining interest in legal instruction in the future, including the current social and cultural interest in moral values, the American Bar Association mandate, increasing numbers of lawyers that will result in new competitive tactics, increasing litigation involving ethical controversy and enhanced support within the university community. The widespread teaching of legal ethics, incremental qualitative and quantitative

improvement in teaching materials, and increased active involvement by respected scholars are but a few forces that will continue promoting interest in change.

Although barriers to change may inhibit needed progress in legal ethics instruction, the tendency of both individuals and institutions to ward off change and block action in some instances is therapeutic. It is clear that some opposition is a response to real threats, as in the case of non-members potentially accessing an exclusive professional monopoly, hence diffusing boundaries, status, and self-identity. Yet defense mechanisms are a normal and useful part of change processes. The dialectic of challenge and response to change initiatives tends, in the long run, to weed out ill-conceived ideas and work out potential problems that may be later unexpectedly encountered at later dates.

This study analyzes perceptions of generic forces that may restrain the implementation of needed change in legal ethics instruction. It does not advocate specific reform nor implementing strategies. Nonetheless implementors of curriculum reform should realize that restraining influences to innovation are widespread, interrelated, powerful and may impede the realization of needed change. According to Goodwin Watson and Kurt Lewin, change will be accomplished more quickly and with less tension if change strategies aim at breaking down impulses that prevail against forces promoting change. Reformers should investigate change tactics that mitigate generic obstructing influences because they are the most recurring and steadfast. Because many identified generic forces may be significant ingredients in both legal ethics instruction and legal education reform efforts, change agents

should consider using strategies that enhance the general context for change within law schools. A review of successful strategies used in previous curricular reform efforts may suggest ways to weaken generic restraining forces.

Also implied by the study is the need for developing greater consensus among legal educators about the kinds of change that are needed in legal ethics instruction and for agreeing upon premises of the knowledge base, the purpose of instruction, relevant pedagogy, and characteristics of students and faculty. Most faculty interviewed for this study indicate that legal ethics is not their primary area of teaching and research; more typically, it is one of several. If some measure of theoretical coherence is to be achieved and any sense of docrinal systemization brought to the curriculum, scholars need to develop concerted and sustained attention to the field. Faculty sabbaticals and educational opportunities may be one way to promote interest and commitment; otherwise, the lack of agreement about necessary change and the theoretical basis of the curriculum may, in the end, qualify reform requiring collective attention and advocacy.

Legal education authorities and experts questioned for this study clearly point to the need for curricular change. Watson's typology and other change theories may be useful in diagnosing and clarifying the nature and strength of resisting forces to reform. Strategies that counter resisting forces may represent the most significant promise for the final achievement of a successful legal ethics curriculum.

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35. Additional law faculty interviewed for this study included Forest Jack Bowman, West Virginia University College of Law; John M. Burkoff, University of Pittsburgh School of Law; Leslie Pickering Francis, University of Utah College of Law; Marie Faylinger, Hamline University School of Law; and John K. Morris, University of Utah. The investigator also discussed issues relating to legal ethics instruction with Carl M. Selinger, Dean of the West Virginia University College of Law, and David Riesman, Henry Ford II Professor of Social Science at Harvard University.

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